No. 83-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

—v.—

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Cross Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR CROSS RESPONDENTS JOHN SALORIO, ROBERT COE AND JOHN D. McGARR, JR. IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI

Max Gitter,
345 Park Avenue
New York, New York 10154
(212) 644-8000

Adrian M. Foley, Jr.,
Gateway I
Newark, New Jersey 07102
(201) 643-2060

Counsel for Cross Respondents

Of Counsel:

Richard A. Rosen,
Paul, Weiss, Rifkind, Wharton & Garrison
A partnership including professional corporations
New York, New York

Kevin J. Coakley,
Connell Foley & Geiser
Newark, New Jersey

November 7, 1983

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Counterstatement of the Case

For the last three years, cross petitioner Glaser has defended the constitutionality of the New Jersey Commuter Income Tax under the Privileges and Immunities Clause on the grounds that the tax, levied exclusively on New Yorkers, was commensurate either with the costs assertedly imposed by New York residents on its transportation facilities, or with amorphous and unquantifiable "benefits" New Yorkers derived from these facilities. Now that these defenses have been decisively rejected by the New Jersey Supreme Court in light of *Austin* v. *New*

Hampshire, 420 U.S. 656 (1975), cross petitioner abandons them. Instead, the cross petitioner has in effect asked this Court to reconsider its 1980 denial of certiorari in this case. But the two arguments cross petitioner now seeks to revive are no more worthy of this Court's attention in 1983 than they were in 1980.

First, cross petitioner contends that cross respondents, individual New York commuters, are somehow estopped from bringing an action under the Privileges and Immunities Clause by an unsigned press release issued by the Governors of New York and New Jersey in 1962. While the cross petitioner has unilaterally dubbed the press release an "interstate compact," any interstate agreement affecting individual rights is subject to the same constitutional constraints as the Commuter Income Tax itself. New York and New Jersey cannot, consistent with the Privileges and Immunities Clause, agree to do what New Jersey cannot do unilaterally. In any event, there is no factual basis in this record for transmogrifying a press release into a solemn compact, especially when no reciprocal tax legislation arose out of the so-called agreement. And since the New Jersey Supreme Court has previously decided, as a matter of state law, that New York and its residents are not estopped from challenging the tax, *no* disposition by this Court of the questions presented by cross petitioner would change the ultimate result in this case. Certiorari should therefore be denied.

Alternatively, cross petitioner seeks certiorari on the theory that, even though the taxes paid by New Yorkers under the Commuter Income Tax are grotesquely disproportionate to any costs they might impose on New Jersey's transportation system, nevertheless the tax should be sustained because New Yorkers pay, on the average, lower overall taxes to New Jersey than do New Jersey residents. This theory was, however, expressly rejected in *Austin*, and cross petitioner proposes no reason why this Court should consider that issue anew.

A. The "Accord" Between New York and New Jersey is a Fiction.

The cross petition for certiorari is predicated chiefly on the existence of an alleged executive accord or agreement between the Governors of New York and New Jersey to respect one another's taxing schemes. The background facts—or, more precisely, the absence of facts—make clear why the cross petition does not present issues worthy of this Court's review.

There is *no* document in this record—or anywhere else—even purporting to be an agreement or compact between the States of New York and New Jersey. The purported "agreement" relied upon by cross petitioner is nothing but a press release issued by then-Governors Hughes and Rockefeller (Appendix C to Cross Petition at 66a-67a), which *refers* to an "understanding," but does not purport to be an "agreement."[1] No conjuring can elevate this unsigned statement into a formal agreement between two sovereign states, binding on citizens of New York twenty years later.

Second, no reciprocal tax legislation was enacted by New York and New Jersey pursuant to any "agreement." Cross petitioner has simply christened the separate and independent tax statutes of each state "reciprocal". Indeed, the Commuter Income Tax at issue here could not possibly have been enacted pursuant to the "agreement," since it was enacted on May 19, 1961—a full year before the press release was issued.

When New York and New Jersey wish to enter into a binding agreement, they know how to do so. The record below contains a formal contract concerning income tax withholding procedures, replete with "whereas" clauses setting forth the

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1 Cross petitioner has also included in its Appendix a "Joint Statement" (6la-64a). But in proceedings below, it was conceded that this unsigned document had been found in an old file. There was no evidence as to whether it was a draft; whether it had ever been reviewed, let alone approved, by New York; or whether it had been released.

reasons for the agreement, paragraphs explicitly delineating the terms of the agreement, and signatures of representatives of New York and New Jersey.

In any event, even if there were any basis for concluding that an "accord" was entered in 1962, New York, by its subsequent conduct, unequivocally withdrew from it. Thus, in 1976, after this Court's *Austin* decision, New York instituted litigation challenging the validity of New Jersey's Commuter Income Tax. *New York* v. *New Jersey*, 429 U.S. 810 (1976). Moreover, the fact, trumpeted by respondent, that New York has defrayed the legal expenses entailed by the present litigation only underlines the fact that it does not consent to the discriminatory taxing of its citizens by New Jersey. Surely, if New York can be said to have entered an accord merely by issuing a press release, no greater formalities need be observed in rescinding it.

Finally, the origins and history of respondent's "accord" theory make it all the more clear that this argument is a makeweight. Thus, when cross petitioner opposed New York's motion for leave to file a bill of complaint within the original jurisdiction of this Court in 1976, it never raised the point—rather obvious, if true—that New York had consented to the tax it was challenging. Indeed, the contention that the press release was sufficient to estop cross respondents from challenging the constitutional defects of the Commuter Income Tax was not raised during the lengthy proceedings in the trial court, or included in the voluminous evidence submitted, until it was urged in a *reply* brief in 1978—many months after the litigation had commenced.

B. There is No New Jersey Tax That Falls Exclusively on Residents of New Jersey.

As an alternative ground for seeking certiorari, cross petitioner concedes that the Commuter Income Tax cannot be justified with reference to any peculiar costs or burdens that New York residents impose on New Jersey's transportation facilities, but urges that the magnitude of the levies under the

tax are reasonable in light of the substantial *overall* tax burden borne by New Jersey residents. While, as we demonstrate below, this contention is foreclosed by *Austin*, even on its own terms cross petitioner's argument is predicated on a series of factual mistatements and misleading assumptions.

Cross petitioner's brief states that "New Jersey residents pay substantial other state taxes ***which nonresidents do not pay***" (emphasis added). This statement is flatly false. There is not a single tax levied by the State of New Jersey that is applicable *only* to New Jersey residents. The record below demonstrates, for example, that New York commuters pay, at a minimum, $2.6 million per year to New Jersey in motor fuel taxes alone, and that this sum *more* than makes up for any costs New Yorkers impose on New Jersey's transportation facilities. Similarly, at the local level, every nonresident who owns property in New Jersey pays the same property taxes, to support the same government services, that his neighbor who is a New Jersey resident pays.

Thus, the Commuter Income Tax challenged here is not offset by any tax imposed exclusively on New Jersey residents. And, ironically, as the New Jersey Supreme Court found, funds obtained from New Yorkers under the Commuter Income Tax are often used to defray the costs of *intrastate* buses and rail service, which New Yorkers rarely use.[2] What cross petitioner is really complaining of, then, is that New Jersey residents pay more tax dollars to New Jersey than nonresidents do. But it hardly follows from this unsurprising fact that New Jersey residents "pay more than their fair share of the costs of [New Jersey] government." Nor does it justify the discriminatory tax at issue here.

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2 New Yorkers make up less than 3% of the ridership of New Jersey's commuter railroads, and yet Commuter Income Tax receipts were used to provide 75% of the subsidies for this service—resulting in New Yorkers' paying more than 25 times their fair share. Similarly, Commuter Income Tax receipts provide 20% of the subsidies for intrastate buses, even though New Yorkers comprise only 2.6% of bus passengers. *Salorio* v. *Glaser*, 414 A.2d 943, 954 & n. 22 (N.J. S. Ct.), *cert. denied*, 449 U.S. 874 (1980).

SUMMARY OF ARGUMENT

The "Questions Presented" by the cross petitioner presuppose that an agreement was entered into by the States of New York and New Jersey. But the record shows that there is no such agreement. Thus, the "Questions Presented" by the cross petitioner are hypothetical constitutional questions that this Court need not decide.

The "Questions Presented" are also wholly irrelevant to whether the Commuter Income Tax is unconstitutional, since any agreement of whatever form between states is itself subject to the Privileges and Immunities Clause. No agreement can affect taxpayers' individual right under the Privileges and Immunities Clause to be free from discriminatory taxation.

The New Jersey Supreme Court concluded, as a matter of statutory construction, that New York had not bound itself to any agreement, and that its citizens were therefore not estopped from challenging the tax. This conclusion rests on an independent and adequate state law ground, which this Court has always held it has no jurisdiction to review.

The alleged agreement would not, in any event, be legally enforceable even if it did exist. The "agreement" does not comply with the requirements of the Compact Clause even though the agreement, as cross petitioner describes it, would grant one state the right to impinge on another state's power to regulate the tax liabilities of its own citizens, in a fashion repugnant to the Privileges and Immunities Clause.

The contention that the Court below erred in failing to compare Commuter Income Tax revenues with *all* state taxes paid by both residents and nonresidents alike is foreclosed by *Austin* v. *New Hampshire*.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

CROSS PETITIONER'S CLAIM BASED UPON AN "AGREEMENT" BETWEEN NEW YORK AND NEW JERSEY IS NOT WORTHY OF REVIEW.

Cross petitioner's claim based on a purported agreement between New York and New Jersey raises no issue worthy of review by this Court for the following reasons:

A. The Facts of Record Do Not Permit the Formulation of the "Questions Presented" By the Cross Petitioner.

The facts of record show conclusively that there was *no* agreement between New York and New Jersey. Although the press release mentions an "understanding" between the Governors of New York and New Jersey, it is obvious from the face of the press release that it is not itself an agreement. There is not even a family resemblance between the casual document on which cross petitioner relies and the formal interstate agreement, signed by representatives of both states, in the record below.

There was *no* resolution by the New Jersey Supreme Court in 1980 of this threshold factual question. The Court specifically noted that "[t]he parties disagree over the existence and legal effect to be given the *alleged* 'accord' . . . " (emphasis supplied), but chose not to reach the issue; it did not affirm the finding of the lower court, nor did it remand this question to the trial court. 414 A.2d at 956. At best, then, there remains a purely factual dispute between the parties concerning the very existence of the putative accord.

Before reaching the merits of the constitutional claim presented in the cross petition, then, this Court would be required to resolve this question of fact. Yet this Court does not grant certiorari to review factual determinations, especially when the evidence has not been reviewed by the appellate courts. *See*,

e.g., *General Pictures Co.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence. . . "); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts").

In the absence of assurance from the record below that an agreement between New York and New Jersey exists at all, the "Questions Presented" in the cross petition are nothing more than hypothetical. Accordingly, this Court should not grant certiorari. *See*, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' "); *Hagans* v. *Lavine*, 415 U.S. 528, 547 (1974) ("a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available").

Moreover, this Court cannot address the constitutional claim without determining the legal effect of any purported agreement—a question of state, *not* federal, law over which the Court has repeatedly held it has no jurisdiction. *See*, *e.g.*, *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).[3]

B. Any "Accord" Must Itself Pass Muster Under the Privileges and Immunities Clause.

This Court explicitly stated in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), that any agreement of whatever form between states is *itself* subject to the limitations of the Privileges and Immunities Clause. *Id.* at

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3 As cross petitioner concedes, Congress has never approved the supposed "agreement"; therefore, the legal effect and meaning of the bilateral accord are purely questions of state law. *See Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981) ("Because congressional consent *transforms* an interstate compact . . . into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. . . .") (emphasis supplied).

478 (citing *Austin*). Cross petitioner fails to recognize this basic point: what one state cannot do alone by means of legislation, two states cannot do together by "agreement." An agreement which, on cross petitioner's terms, would require New York to "respect and enforce" New Jersey's tax statute is invalid unless the statute the agreement is designed to enforce is, standing alone, constitutional. As the New Jersey Supreme Court rightly determined in its 1980 opinion, the Commuter Income Tax "must independently pass muster under the Privileges and Immunities Clause," 414 A.2d at 957-58. Thus, nothing in this controversy can possibly depend on whether cross petitioner's argument concerning the "accord" is right or wrong.

No "agreement" between New York and New Jersey may preclude taxpayers from asserting their individual rights under the Privileges and Immunities Clause. As this Court said in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60, 82 (1920):

> "A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States."

The Court in *Austin* quoted this language, terming it "fully applicable" in that case. 420 U.S. at 667. To be sure, agreements between states providing "reciprocally *favorable* treatment of nonresidents" may be constitutional. *Id.* at 667 n. 12 (emphasis supplied). But an agreement to enforce a New Jersey statute like the Commuter Income Tax, which does not grant treatment to New York residents that is at least as favorable as that granted to New Jersey residents, is impermissible. Thus, the short answer to cross petitioner's circular argument that the legislation at issue here is "favorable" or, at worst, "neutral," is that the New Jersey legislation is identical with the legislation struck down in *Austin* as not being "reciprocally favorable."

C. The Questions Presented By the Cross Petition Raise Issues of State, Not Federal, Law.

In its 1980 opinion, the New Jersey Supreme Court interpreted the Commuter Income Tax and the New York taxing statute to determine whether, pursuant to these state statutes, New York State had agreed to bind itself or its citizens to accept the Commuter Income Tax. The Court concluded that, even assuming that New York could constitutionally "restrict its prerogative for fashioning tax policy by agreement with New Jersey, *it is clear that New York has not done so here*." *Salorio*, *supra*, 414 A.2d at 956 (emphasis supplied). As a matter of statutory interpretation, then, "the present interaction of the ETT with New York's personal income tax law is susceptible to change at any time by the legislature of either state. . . ." *Id.* at 957. In short, the New Jersey Supreme Court rejected cross petitioner's contention that the statutes, or any alleged accord, estop cross respondents' challenge to the Commuter Income Tax.

Since the interpretation of any interstate agreement not approved by Congress is a matter of state law only, *Cuyler*, *supra*, 449 U.S. at 438-39 & n.7, the questions presented in the cross petition raise no issue of federal law. In such circumstances, this Court has always concluded that it lacks jurisdiction. *Murdock*, *supra*, 87 U.S. (20 Wall.) at 632-33. Even if the New Jersey Supreme Court's opinion also touched on constitutional issues, this Court still lacks jurisdiction, since the lower court's opinion rests on an adequate and independent state law ground. Any review of the federal issue would not change the result below. *See, e.g.*, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945) ("our power is to reverse wrong judgments, not to revise opinions").[4]

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4 At best, cross petitioner could argue that it is unclear whether the New Jersey Court was relying on state or federal law in addressing the press release issue. Where, as here, the cross petitioner has not sustained his burden of establishing clearly the jurisdiction of this

D. The New Jersey Supreme Court's Decision is Fully Consistent with *Multistate Tax Commission.*

The New Jersey Supreme Court's alternative conclusion that, even if New York had bound itself to the alleged agreement, it was not legally enforceable, is fully consistent with this Court's decision in *Multistate Tax Commission, supra*, 434 U.S. 452, and presents no issue worthy of review.

An agreement by New York purporting to give New Jersey the right to "enforce" and thereby perpetuate the tax credit currently extended to New York residents would be a relinquishment of New York's sovereign power to regulate the tax liabilities of its own citizens and to rescind its own legislation. Such a tax credit, the New Jersey Supreme Court found, is "a matter of legislative grace," control of which New York cannot concede to New Jersey without congressional approval. *Salorio, supra*, 414 A.2d at 957. Especially where, as here, the effect of the alleged "accord" would be to permit New Jersey to impose a special tax burden exclusively on persons politically unrepresented in the state, "the structural balance essential to the concept of federalism" is directly and inescapably at stake. *Austin, supra*, 420 U.S. at 662.[5]

As the New Jersey Supreme Court rightly reasoned, such relinquishment of sovereign power by one state to another state encroaches on these same principles of federalism. *Salorio, supra*, 414 A.2d at 957. Under established rule, affirmed in *Multistate Tax Commission*, any agreement threatening or

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Court, the Court has ruled that it is without jurisdiction to decide the questions presented. *See, e.g., Durley* v. *Mayo*, 351 U.S. 277, 281, 285 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547-48 (1952); *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942).

5 *See* J. Ely, *Democracy and Distrust* 83 (1980) (". . . the reason inequalities against nonresidents and not others were singled out for prohibition in the original document is obvious: nonresidents are a paradigmatically powerless class politically.")

altering the federal structure in this manner must comply with the strictures of the Compact Clause.[6]

Instructively, the purported agreement at issue here is exactly the opposite of the reciprocal agreement in *Bode* v. *Barrett*, 344 U.S. 583 (1953), cited by cross petitioner. In *Bode*, Illinois agreed to tax only its *own* citizens, and to provide exemptions for non-citizens, if other states reciprocated. *Id.* at 586. Obviously, such an arrangement contemplates that each state *retains* control over the taxation of its own citizens, thereby precluding abusive discrimination and avoiding the dangers of retaliatory tax legislation among states.

Congress never approved any purported accord between New York and New Jersey concerning the Commuter Income Tax. The New Jersey Supreme Court, concluding in the alternative that such an unratified accord would violate the Compact Clause, thus correctly applied settled principles in this case. No issue worthy of review by this Court is presented.[7]

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6 Cross petitioner, having created an "agreement" out of whole cloth by ascribing solemn characteristics to a press release, then proceeded to attribute powers to this "agreement" that far surpass even the powers actually granted by the states in the agreement scrutinized in *Multistate Tax Commission*.

Unlike the situation posited by the "agreement" alleged here, no state that was a party to the Multistate Tax Compact relinquished any of its sovereign power. The Commission created by the state had the power to adopt only advisory regulations that would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457. Individual states retained "*complete control over all legislation and administrative action*" affecting tax liabilities. *Id.* (emphasis supplied).

7 Because the cross petition for certiorari was not filed until October 6, 1983, more than 90 days from the entry of the judgment below, in any event the cross petition cannot be granted unless cross respondent's timely petition for certiorari is granted as well. *See* Supreme Court Rule 20.5.

POINT II

CROSS PETITIONER'S ARGUMENT THAT THE COMMUTER INCOME TAX SHOULD BE UPHELD BECAUSE NEW JERSEYANS PAY MORE DOLLARS IN TAXES TO NEW JERSEY THAN DO NEW YORKERS IS FRIVOLOUS, AND NOT WORTHY OF REVIEW.

Cross petitioner's fall-back defense of the constitutionality of the Commuter Income Tax is not based on a showing that New York commuters are a "peculiar source" of any transportation problem, or that the tax is a carefully tailored response to that problem. Indeed, after years of litigation, a full trial on the merits, and careful review by the highest court of New Jersey, the cross petitioner, in this Court, abandons *any* attempt to justify the size of the levies under the tax in relation to the costs New York commuters actually impose on transportation facilities. Instead, he points to the unstartling fact that residents of New Jersey pay higher *overall* taxes to their home state than nonresidents do, and asks this Court to conclude, without further ado, that New Jersey residents therefore pay "more than their fair share" of the costs of New Jersey government. This argument is plainly frivolous.

First, despite suggestions to the contrary in the cross petition, New Jersey levies *no* taxes on residents only. As we demonstrated above, New Yorkers who own property in New Jersey pay New Jersey real estate taxes, New Yorkers who buy products in New Jersey pay New Jersey sales taxes, and so on. Of course, many more New Jersey residents own property in the state than do New York commuters, so it is only natural that New Jerseyans, on the average, pay higher overall New Jersey taxes than do the commuters. But in constitutional terms, this is a meaningless comparison.[8]

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8 Cross petitioner's theory would justify a statute that imposed gasoline taxes and highway tolls exclusively on nonresidents, even if all other taxes were equally applicable to everyone. Moreover, the vast

From this Court's earliest consideration of the Privileges and Immunities Clause, it has recognized that the only relevant comparison is between taxes paid by residents alone and taxes paid exclusively by nonresidents. Thus, in *Austin*, *supra*, 420 U.S. 656, the Court struck down a New Hampshire tax that fell "exclusively on the income of non-residents" and that was "not offset even approximately by other taxes imposed upon residents alone." *Id.* at 665. For purposes of deciding whether the New Hampshire tax discriminated against nonresidents, this Court held that business, property and real estate transfer taxes levied on residents and nonresidents alike were simply not germane to the inquiry. *Id.* at 659 n.3, 665.

Similarly, in *Travellers' Ins. Co.* v. *Connecticut*, 185 U.S. 364 (1902), cited by cross petitioner, the Court upheld a tax statute that—superficially—discriminated against nonresidents. The Court compared the tax to the local property taxes levied *exclusively* on residents, which were at least equally substantial. *Id.* at 368. The Court concluded that the contribution by non-residents to state and local property tax revenues "was no more than the ratable share of their property within the state." *Austin*, *supra*, 420 U.S. at 664.[9]

The logic of comparing taxes imposed on nonresidents with those imposed exclusively on residents is readily apparent. A

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preponderance of the tax revenues raised by New Jersey—all of which "count" for purposes of the comparison cross petitioner draws—are used to defray the costs of activities that benefit New Jersey residents only; local schools are a good example.

9 The other cases cited by cross petitioner directly contradict his position. In each case, the Court compared the taxes paid by nonresidents to other taxes levied exclusively on residents, to determine if any discrimination existed. *See General American Tank Car Corp.* v. *Day*, 270 U.S. 367 (1926); *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932); *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245 (1928). Thus, for example, in *Day*, the Court found that nonresidents were *exempt* from all local taxes, and that the challenged tax was "in lieu of" such taxes. 270 U.S. at 371-72. In any event, each of the three cases was decided under the Equal Protection and Commerce Clauses; no Privileges and Immunities Clause argument was raised.

state may be legitimately concerned that nonresidents who avail themselves of the benefits of state resources should not obtain a "free ride." A tax on nonresidents may therefore, in some circumstances, create *equality* between residents and nonresidents. But where, as here, New Yorkers pay every single tax paid by New Jersey residents, and in fact more often than not see their tax payments used to benefit New Jersey residents alone, there is no free ride.

Equally and independently significant, cross petitioner's argument simply ignores this Court's decisions in *Austin*[10], *Toomer* v. *Witsell*, 334 U.S. 385 (1948), and *Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978). If these cases mean anything, they stand for the proposition that to justify discrimination based on the fact of state citizenship, a state must show, first, that the nonresidents are the "peculiar source" of the alleged problem, and, second, that there is a "substantial relationship" between the burden imposed by nonresidents and the discrimination practised against them. In this Court, cross petitioner does not even contend that the Commuter Income Tax meets either branch of this test. Since the cross petitioner has presented the Court with no reasons why *Austin*, *Toomer* and *Orbeck* should be overruled, certiorari should be denied.

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10 Indeed, cross petitioner's position is rather schizophrenic, since its cross petition is entirely inconsistent with the argument contained in its brief in opposition to cross respondents' petition for certiorari. There, it contended that *Austin* compels "a calculation of whether the tax bears a substantial relationship to the evils which the tax has been enacted to correct" (p. 2)—a rather more relaxed standard than that imposed by this Court, but nevertheless one clearly not met here.

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should not be granted.

Respectfully submitted,

Max Gitter
Adrian M. Foley, Jr.

Counsel for Cross Respondents

Of Counsel:

Richard A. Rosen
Kevin J. Coakley

November 7, 1983